Hastings Law Journal

Volume 33 | Issue 1 Article 5

1-1981

Johns-Manville Products Corp. v. Superior Court: The Not-So-Exclusive Remedy Rule

Karl Olson

Johns-Manville Products Corp. v. Superior Court: The Not-So-Exclusive Remedy Rule

California courts have been sharply split during the past two decades over whether workers' compensation should be the exclusive remedy for an employee who is injured by his or her employer's intentional torts.[1] In *Johns-Manville Products Corp. v. Superior Court*,[2] the California Supreme Court discussed this broad issue at length, but declined to resolve it. The court held that while workers' compensation is the exclusive remedy for initial injuries suffered by an asbestos worker whose employer allegedly concealed the dangers of the job, the employee could sue for aggravation of his injuries caused by the alleged fraudulent concealment of the disease and its cause.[3]

This Comment examines the question of workers' compensation exclusivity in California, emphasizing three broad groups of job-related intentional torts: workplace assault and battery, intentional infliction of emotional distress, and employer concealment of employment hazards and diseases. The Comment discusses the reasons for and against allowing common-law suits against the employer for these torts. It also examines whether the California statute that provides for additional compensation when the employer is guilty of "serious and willful misconduct"[4] precludes common-law suits. The Comment concludes with an analysis of the *Johns-Manville* opinion and its effect on the exclusive-remedy rule.

Johns-Manville Products Corp. v. Superior Court

Johns-Manville Products Corp. v. Superior Court[5] is one of an estimated 8,000 cases in the nation involving exposure to asbestos.[6] The

1. *See, e.g.*, Magliulo v. Superior Court, 47 Cal. App. 3d 760, 121 Cal. Rptr. 621 (1975); Azevedo v. Abel, 264 Cal. App. 2d 451, 70 Cal. Rptr. 710 (1968).

California uses the term workers' compensation to refer to what was traditionally known as workmen's compensation. *See* CAL. LAB. CODE § 3200 (West Supp. 1981). Most states still use the latter term. This Note will use the term "workers' compensation" except in references to specific state "workmen's compensation" laws.

2. 27 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (1980).

3. *Id.* at 469, 612 P.2d at 950, 165 Cal. Rptr. at 860.

4. CAL. LAB. CODE § 4553 (West Supp 1981).

5. 27 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (1980).

6. Rout, *Product-Liability Law Is in Flux as Attorneys Test a Radical Doctrine*, Wall St. J., Dec. 30, 1980, at 1, 8 col. 4. Although many of the asbestos cases do not involve suits against the plaintiff's employer, the issue involved in *Johns-Manville* has arisen elsewhere. *See* Copeland v. Johns-Manville Products Corp., 492 F. Supp. 498 (D. N.J. 1980) (employee

plaintiff[7] in *Johns-Manville* alleged that he had developed asbestos-related illnesses from his exposure to the substance over the course of twenty-nine years at the corporation's plant. He further alleged that the corporation had known since 1924 of the dangers of asbestos, yet had concealed that knowledge from him, advising him that it was safe to work in close proximity to the substance. The plaintiff also asserted that doctors retained by the employer had not been furnished with adequate information about the risk of asbestos exposure and that the employer had failed to advise the doctors that the plaintiff was developing pulmonary disease as the result of working conditions at the plant. Contending that he would have been protected had the dangers of asbestos been revealed, the plaintiff claimed that the corporation had falsely and fraudulently concealed the dangers to induce him to continue working, unaware of the risks involved.[8]

The supreme court held that the plaintiff's action was not barred by the exclusivity provision[9] of the workers' compensation law.[10] The court agreed with Johns-Manville that allegations of intentional misconduct against the employer are usually covered by the workers' compensation provision for "serious and willful misconduct,"[11] and thus do not justify a common-law cause of action.[12] The court, however, perceived a "trend" towards allowing a common-law tort suit when the employer deliberately injures the employee, or when the intentional

suit charging concealment of asbestos hazards barred by New Jersey workers' compensation law); Petruska v. Johns-Manville, 83 F.R.D. 39 (E.D. Pa. 1979) (employee suit charging concealment of asbestos hazards barred by Pennsylvania workers' compensation law); McDaniel v. Johns-Manville Sales Corp., 487 F. Supp. 714 (N.D. Ill. 1978) (employee allowed to sue employer for alleged concealment of asbestos hazards, intentional and felonious poisoning, fraud, and misrepresentation). *See also* Austin v. Johns-Manville Sales Corp., 508 F. Supp. 313, 316-17 (D. Me. 1981) (asbestos manufacturers' third-party action against worker's employer, seeking contribution and indemnity for their possible liability in worker's wrongful death action, barred by exclusive-remedy provision of Longshoremen's and Harbor Workers' Compensation Act; *Johns-Manville v. Superior Court*'s distinction between initial injury and aggravation of injury cited).

7. Real party in interest and plaintiff Reba Rudkin died of lung cancer before the supreme court decision. Johns-Manville Products Corp. v. Superior Court, 27 Cal. 3d at 470, 612 P.2d at 951, 165 Cal. Rptr. at 861. Rudkin's suit was consolidated with several others filed by former employees at Johns-Manville's Pittsburg, California plant. The supreme court's disposition of the Rudkin action also allowed the other plaintiffs to proceed to trial. *Id.* at 470 n.3, 612 P.2d at 951 n.3, 165 Cal. Rptr. at 861 n.3. The first such trial began in November, 1981. Shinoff, *Benchmark asbestos suit to come to trial this week*, S.F. Examiner, Nov. 29, 1981, § B at 1, col. 1.

8. *Id.* at 469-70, 612 P.2d at 950-51, 165 Cal. Rptr. at 860-61.

9. CAL. LAB. CODE § 3601 (West Supp. 1981). See notes 35-36 & accompanying text *supra*.

10. 27 Cal. 3d at 469, 612 P.2d at 950, 165 Cal. Rptr. at 860.

11. *Id.* at 473, 612 P.2d at 953, 165 Cal. Rptr. at 863 (citing CAL. LAB. CODE § 4553 (West Supp. 1981)).

12. *Id.* at 474, 612 P.2d at 954, 165 Cal. Rptr. at 863.

misconduct results in the aggravation of a work-related injury.[13] The plaintiff's allegations of what the court called "egregious"[14] and "flagrant"[15] conduct were held sufficient to state a cause of action for aggravation of the disease, although not sufficient to state a cause of action based on the hazards of the employment that caused him to contract the disease.[16]

Johns-Manville shows both a determination to adhere to the exclusive-remedy rule and a willingness to relax the rule in "rare instances of malicious oppression."[17] It thus fails to resolve the debate over the exclusivity bar in cases of intentional torts.

Background of the Exclusivity Rule

Workers' compensation laws make compensation the exclusive remedy for an injured worker against his or her employer, if the injury falls within the coverage formula of the statute and if the employer has secured compensation insurance as required by law.[18] Exclusivity is

13. *Id.* at 476, 612 P.2d at 955, 165 Cal. Rptr. at 865.

14. *Id.* at 478, 612 P.2d at 956, 165 Cal. Rptr. at 866.

15. *Id.*

16. *Id.* at 477, 612 P.2d at 955, 165 Cal. Rptr. at 865.

17. McGee v. McNally, 119 Cal. App. 3d 891, 895, 174 Cal. Rptr. 253, 256 (1981).

18. 2A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 65.00 (1976) [hereinafter cited as LARSON]. No American jurisdiction gives an employee covered by workers' compensation the option to sue for damages in the absence of employer non-compliance with the act or an employer's misconduct. The employer's failure to secure compensation, however, allows the employee to sue. *See, e.g.*, CAL. LAB. CODE § 3706 (West Supp. 1981).

Seven states statutorily authorize common-law suits against the employer when the latter commits certain kinds of torts. ARIZ. REV. STAT. ANN. § 23-1022 (1970) (employee has option to sue for willful misconduct); IDAHO CODE § 72-209(3) (1973) (willful or unprovoked physical aggression grounds for suit); MD. ANN. CODE art. 101, § 44 (1957) (suit allowed for torts of "deliberate intention"); OR. REV. STAT. § 656.156 (1979) (same); WASH. REV. CODE ANN. § 51.24.020 (1981 Supp.) (same); W. VA. CODE § 23-4-2 (Michie Supp. 1978) (same); TEX. REV. CIV. STAT. ANN. art. 8306, § 5 (Vernon 1967) (exemplary damages allowed for death caused by willful act or omission or gross negligence).

In several other states, judicial decisions have allowed tort suits. *See, e.g.*, Boek v. Wong Hing, 180 Minn. 470, 231 N.W. 233 (1930); Lavin v. Goldberg Bldg. Material Corp., 274 A.D. 690, 693-94, 87 N.Y.S.2d 90, 93 (1949); Le Pochat v. Pendleton, 187 Misc. 296, 298, 63 N.Y.S.2d 313, 315-16 (Sup. Ct. 1946); Readinger v. Gottschall, 201 Pa. Super. Ct. 134, 138, 191 A.2d 694, 696 (1963); Stewart v. McLellan's Stores Co., 194 S.C. 50, 9 S.E.2d 35 (1940).

Another 10 states impose percentage penalties on the employer in the form of additional compensation for various kinds of misconduct or violation of safety statutes or orders. CAL. LAB. CODE § 4553 (West Supp. 1981) (50%, but not more than $10,000, for serious and willful misconduct); KY. REV. STAT. § 342.165 (1978) (15%); MASS. ANN. LAWS ch. 152, § 28 (Michie/Law. Co-op 1965) (100% for serious and willful misconduct); MO. ANN. STAT. § 287.120 (Vernon Supp. 1980) (15%); N.M. STAT. ANN. § 52-1-108 (1978) (10%); N.C. GEN. STAT. § 97-12 (1977) (10%); OHIO CONST. art. II, § 35 (15-50% in discretion of board); S.C. CODE § 42-9-70 (1976) (10%); UTAH CODE ANN. § 35-1-12 (1974) (15%); WIS. STAT. ANN. § 102.57 (West 1973) (15%, but not more than $7,500).

part of the *quid pro quo* by which workers were granted a dependable, although modest, compensation for job-related injuries and were relieved of the need to prove an employer's negligence and the employer was spared the burden of defending against common-law suits.[19] While workers' compensation continues to provide a dependable minimum of compensation, benefit levels have failed to keep pace with inflation.[20] As a result, employees often try to bring their actions outside of the workers' compensation system, while employers, who once opposed workers' compensation, now strenuously advocate it to avoid large damage verdicts.[21]

California originally gave the worker the option to sue rather than to accept compensation when the injury was caused by the "personal gross negligence or wilful personal misconduct of the employer" or by the employer's violation of a safety statute.[22] This provision of the original 1911 act was retained in the 1913 amendments to the act.[23] The 1917 amendments to the California compensation act, predecessor of the current workers' compensation system, eliminated the worker's option to sue, providing instead that "serious and wilful misconduct" by the employer was grounds for a fifty percent increase in compensation benefits, up to a maximum of $2,500.[24] "Serious and wilful misconduct" was defined in an early California Supreme Court opinion as "conduct which the employer either knew, or ought to have known, if he had turned his mind to the matter, to be conduct likely to jeopardize

19. 2A LARSON, *supra* note 18, at §§ 65.10, 67.30.

20. Workers' compensation systems are intended to compensate for lost wages, not to compensate for pain and suffering. The low benefits make questionable the achievement of even this modest goal. *See generally* Comment, *Workmen's Compensation: Arizona's Elusive Exclusive Remedy*, 1974 ARIZ. ST. L.J. 485, 496-501. In California, the maximum weekly payment is currently $175. *See* 2 W. HANNA, CALIFORNIA LAW OF EMPLOYEE INJURIES AND WORKMEN'S COMPENSATION § 12.01 [2] (1981).

21. *See* Hopkins, *Executive Officer Suits Under the Combination Casualty Policy*, 25 FED'N INS. COUNSEL Q. 169, 172 (1975): "Although employers had contested the passage by legislatures of the compensation acts because of the projected cost factor, this turned out not (necessarily) to be the case. In actuality, the protection of employers from very large tort suits far outweighed any actual expenses that the employers had to pay in compensation benefits." *See generally* J. MASTORIS, CIVIL LITIGATION AND WORKERS COMPENSATION vi (1980): "Ever since the advent of the Workers' Compensation Act, ingenious attorneys representing injured workers have sought ways and means of obtaining greater benefits than the workers' compensation award." The Mastoris treatise is an excellent and concise summary of the law pertaining to the exclusivity rule in California, and contains an extensive discussion of the *Johns-Manville* decision.

22. 1911 Cal. Stats. ch. 399, § 3, at 796-97 (repealed 1913).

23. 1913 Cal. Stats. ch. 176, § 12(b), at 283-84 (repealed 1917).

24. 1917 Cal. Stats. ch. 586, § 6(b), at 834. The serious and willful misconduct provision is now CAL. LAB. CODE § 4553 (West Supp. 1981), which provides a 50% penalty up to a maximum of $10,000.

the safety of his employees."[25]

California's provision for a fifty percent penalty in cases of serious and willful misconduct, with a present ceiling of $10,000,[26] lessens the harshness of the exclusivity rule by providing additional compensation to an injured employee. In addition, because the employer cannot insure against liability for serious and willful misconduct, he or she is penalized by this provision.[27] The provision, however, has not satisfied critics of exclusivity and has failed to stop judicial erosion of the exclusive remedy rule.

Shortcomings of Compensation

Workers' compensation is not designed to compensate for pain and suffering, as does a tort remedy.[28] It is intended to pay a worker's medical bills and to compensate the worker for his or her lost wages. Although it is not as lucrative as some tort awards,[29] employees benefit from liberal construction of the scope-of-employment provisions, which covers almost all job-related accidents or injuries.[30] The elimination of the contributory or comparative negligence defense and the imposition of no-fault liability on the employer also benefit the

25. E. Clemens Horst Co. v. Industrial Accident Comm'n, 184 Cal. 180, 188, 193 P. 105, 108 (1920).

26. CAL. LAB. CODE § 4553 (West Supp. 1981).

27. CAL. INS. CODE § 11661 (West 1972). Insurance can, however, cover the cost of defending against a misconduct charge. The court in Azevedo v. Abel, 264 Cal. App. 2d 451, 70 Cal. Rptr. 710 (1968), considered at length the argument that exclusivity allows a party to insure against its own willful torts, in violation of California's public policy. *See* CAL. INS. CODE § 533 (West 1972); CAL. CIV. CODE § 1668 (West 1973). The *Azevedo* court rejected this argument, holding that the employer's inability to obtain insurance against liability for serious and willful misconduct fulfills the public policy banning insurance against willful injury.

28. 2A LARSON, *supra* note 18, at § 65.20. "As for physical pain and suffering, unless it interferes with earning capacity, no allowance can be made in a compensation award; nevertheless, a common-law suit for pain and suffering from a work-connected injury will not lie." *Id.*

29. *See* note 27 *infra*.

30. CAL. LAB. CODE § 3600 (West Supp. 1981). "Labor Code provisions extending workers' compensation benefits are to be liberally construed in favor of the application of those benefits . . . even where it might be to the advantage of a particular plaintiff to avoid them and seek a remedy at law." Machado v. Hulsman, 119 Cal. App. 3d 453, 455-56, 173 Cal. Rptr. 842-43 (1981) (citing 2 B. WITKIN, SUMMARY OF CALIFORNIA LAW 856 (8th ed. 1971)); *see* Cal. Lab. Code § 3202 (West Supp. 1981); *see also* Balido v. Improved Machinery, Inc., 29 Cal. App. 3d 633, 650, 105 Cal. Rptr. 890, 902 (1972) (Compton, J., concurring and dissenting). A dramatic example of the broad construction of "scope of employment" for purposes of extending workers' compensation benefits is a Michigan case in which a worker, traveling abroad, died from carbon monoxide poisoning in the "course and scope" of a romantic encounter on a business trip. *Husband's Fatal Affair Is Ruled Job-Related*, S.F. Chronicle, June 18, 1981, at 1, col. 2.

worker.[31]

Serious inequities remain, however. When compensation acts were passed, it was difficult to win a tort verdict. In ensuing decades, damage verdicts with large awards for pain and suffering and with punitive damages have become more common.[32] At the same time, workers' compensation benefit levels have remained low,[33] making it advantageous for employees to circumvent the exclusivity provisions of compensation acts.[34]

Under the California workers' compensation system, compensation is the exclusive remedy against the employer for injury or death of an employee if "the conditions of compensation exist."[35] The "conditions of compensation" exist in almost all employee injuries arising out of and in the course of employment.[36] Certain injuries, however, remain uncompensated. For instance, an on-the-job sexual assault often

31. Balido v. Improved Machinery, Inc., 29 Cal. App. 3d 633, 650, 105 Cal. Rptr. 890, 902 (1972) (Compton, J., concurring and dissenting).

32. Page, *The Exclusivity of the Workmen's Compensation Remedy: The Employee's Right to Sue His Employer in Tort*, 4 B.C. INDUS. & COM. L. REV. 555, 556-57 (1963). Mr. Page's exposition of the wide disparity between tort and workers' compensation awards was prophetic in light of the large awards returned by juries in the ensuing two decades. *See, e.g.*, Egan v. Mutual of Omaha Ins. Co., 24 Cal. 3d 809, 598 P.2d 452, 157 Cal. Rptr. 482 (1979) ($5,000,000 punitive damages award in bad-faith insurance case reversed on appeal); Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981) (jury awards $2,500,000 compensatory damages and $125,000,000 punitive damages to auto accident victim; trial judge's reduction of punitive award to $3,500,000 affirmed on appeal); Karjala v. Johns-Manville Products Corp., 523 F.2d 155 (8th Cir. 1975) ($200,000 verdict in strict products liability action against asbestos maker affirmed); Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076 (5th Cir. 1973) ($79,436 verdict against six defendants in seminal strict liability asbestos case). Moreover, the fear of such awards has induced defendants to settle for large sums. *See, e.g.*, Williams v. Schwartz, 61 Cal. App. 3d 628, 131 Cal. Rptr. 200 (1976) (exclusive-remedy provision bars cause of action against employer for emotional distress suffered by wife who witnesses her husband's fatal fall from a bridge negligently maintained by the employer, but third party settles with wife for $175,000); Page, *supra*, at 557 n.12 ("84% of all personal injury claims in New York City result in some recovery for plaintiff"); S.F. Chronicle, March 14, 1981, at 2, col. 1 (680 asbestos workers settle suit with asbestos manufacturers for at least $10,000,000). Success in the courts is not guaranteed, however. *See* Shinoff, *Jury Says 'No' to Asbestos-Case Award*, S.F. Examiner, Apr. 22, 1981, § B, at 10, col. 1 (first of more than 2,000 such cases to come to trial in northern California).

33. *See* Page, *The Exclusivity of the Workmen's Compensation Remedy: The Employee's Right to Sue His Employer in Tort*, 4 B.C. INDUS. & COM. L. REV., 555, 556-57 (1963); Comment, *Workmen's Compensation: Arizona's Elusive Exclusive Remedy*, 1974 ARIZ. ST. L.J. 485, 492-94.

34. *See* 2A LARSON, *supra* note 18, at § 65.10; Hopkins, *Executive Officer Suits Under the Combination Casualty Policy*, 25 FED'N INS. COUNSEL Q. 169, 172 (1975).

35. CAL. LAB. CODE § 3601(a) (West Supp. 1981).

36. CAL. LAB. CODE § 3600 (West Supp. 1981). Section 3600 provides in part: "Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person except as provided in Section 3706, shall, without regard to negligence, exist against an employer for any injury sustained by his employees arising out of and in the

leaves a victim without a remedy unless there are medical bills or lost wages to be reimbursed. Barring a common-law suit is inequitable because the violation of a victim's person often leaves emotional scars, which are not compensable.[37]

The work-connected injury to a sexual organ provides another example of an injury in which compensation laws bar a damage suit, yet provide no compensation.[38] Permanent disability benefits are awarded only for those injuries that adversely affect earning capacity. Sex-impairment injuries generally do not cause work-related physical limitations, do not fall within the accepted meaning of disfigurement, and do not cause serious psychological damage that permanently impairs earning power. Unless the injured employee is allowed to maintain a damage suit, he or she is generally unable to recover for the full and permanent effects of the injury.[39]

Torts that involve non-physical injuries present a similar problem. The torts of false imprisonment, libel, malicious prosecution, invasion of privacy, fraud, deceit, malicious misrepresentation, and intentional infliction of emotional distress, which normally fall outside of the workers' compensation system, may fall within the system if the tort

---

course of the employment and for the death of any employee if the injury proximately causes death, in those cases where the following conditions of compensation concur:

(a) Where, at the time of the injury, both the employer and the employee are subject to the compensation provisions of this division.

(b) Where, at the time of the injury, the employee is performing service growing out of and incidental to his employment and is acting within the course of his employment.

(c) Where the injury is proximately caused by the employment, either with or without negligence.

(d) Where the injury is not caused by the intoxication of the injured employee.

(e) Where the injury is not intentionally self-inflicted.

(f) Where the employee has not willfully and deliberately caused his own death.

(g) Where the injury does not arise out of an altercation in which the injured employee is the initial physical aggressor."

CAL. LAB. CODE § 3706 (West Supp. 1981) permits a common-law action when the employer fails to secure insurance.

37. An on-the-job sexual assault is not an impossibility. *See, e.g.*, Doney v. Tambouratgis, 23 Cal. 3d 91, 587 P.2d 1160, 151 Cal. Rptr. 347 (1979) (assault, battery, and attempted rape alleged; employer precluded from raising exclusivity as a defense on appeal by failure to plead and prove it as an affirmative defense); Meyer v. Graphic Arts Int'l Union Local No. 63-A, 63-B, 88 Cal. App. 3d 176, 151 Cal. Rptr. 597 (1979) (suit allowed for assault, battery, false imprisonment, and rape). *See also* LeGrand & Leonard, *Civil Suits for Sexual Assault: Compensating Rape Victims*, 8 GOLDEN GATE U.L. REV. 479, 498 n.58 (1979); Note, *Sexual Harassment in the Workplace: A Practitioner's Guide to Tort Actions*, 10 GOLDEN GATE U.L. REV. 879, 906-27 (1980) (complete discussion of the interplay between civil suits for sexual harassment and workers' compensation, advocating right to sue and an exception to exclusive remedy).

38. 2A LARSON, *supra* note 18, at § 65.20.

39. Note, *The Treatment of Sexual Impairment Injuries Under Worker's Compensation Laws*, 30 HASTINGS L.J. 1207, 1218 (1979).

results in or becomes intertwined with a physical injury.[40] Compensation benefits may be available in these circumstances. If so, the question is whether an employee should be allowed to collect both a compensation award and a damage award.[41] If compensation benefits are not available because earning capacity is not affected, the question is whether the employee should be left with neither compensation nor damages.

Because of the gross inequity in a case in which compensation benefits will not be awarded, courts should allow a common-law suit. Even when compensation benefits may be available, however, there are strong policy reasons for allowing a common-law suit. The compensation awarded may fall short of "making whole" the tort victim. In addition, the deterrent effect of large damage awards, one of the basic objectives of tort law and of any loss-distribution system, is not realized when workers' compensation is the exclusive remedy for an intentional tort.[42] An employer's workers' compensation insurance shields the employer from the full brunt of liability for his or her conduct. This result is just if the employer is guilty only of negligence because the employer is liable without fault under the workers' compensation system, but is unjust if the employer has intentionally harmed an employee.

The California Case Law: Three Torts, Three Approaches

Several states have adopted statutes that address the problem of work-related intentional torts by allowing a worker to sue his or her employer for torts committed with "deliberate intention."[43] While

40. 2A LARSON, *supra* note 18, at § 68.30. Examples of such "overlaps" abound. *See, e.g.*, Doney v. Tambouratgis, 23 Cal. 3d 91, 587 P.2d 1160, 151 Cal. Rptr. 347 (1979) (assault, battery, attempted rape, causing physical injuries and emotional distress); Unruh v. Truck Ins. Exch., 7 Cal. 3d 616, 498 P.2d 1063, 102 Cal. Rptr. 815 (1972) (combination of assault and intentional infliction of emotional distress causes mental and physical breakdown); Meyer v. Graphic Arts Int'l Union Local No. 63-A, 63-B, 88 Cal. App. 3d 176, 151 Cal. Rptr. 597 (1979) (assault, battery, false imprisonment, and rape); Wright v. FMC Corp., 81 Cal. App. 3d 777, 146 Cal. Rptr. 740 (1978) (alleged fraud induces employee to come into contact with disabling chemicals).

41. Double recovery could be avoided by setting off compensation payments against damages. Unruh v. Truck Ins. Exch., 7 Cal. 3d 616, 636, 498 P.2d 1063, 1077, 102 Cal. Rptr. 815, 829 (1972).

42. *See* 2A LARSON, *supra* note 18, at § 70.20.

43. See note 18 *supra*. However, state courts have not taken a uniform approach to interpreting the phrase "deliberate intention" to produce injury. *Compare* Mandolidis v. Elkins Indus., Inc., 246 S.E.2d 907, 914 (W. Va. 1978) (conduct undertaken with "knowledge and an appreciation of the high degree of risk of physical harm to another created thereby") *with* Bakker v. Baza'r, Inc., 275 Or. 245, 253-54, 551 P.2d 1269, 1274 (1976) (employer must have specific intent to injure employee and must use some means appropriate to that end). Also, simply worded statutes that clearly purport to make workers' compensation the exclusive remedy have been construed to allow suits for intentional torts. *See* Bryan v. Utah Int'l, 533 P.2d 892 (Utah 1975) (suit against a supervisor allowed despite UTAH CODE ANN. § 35-

such an approach may be desirable in California, it is unlikely that the California legislature will expand the worker's tort remedies.[44] Recent legislative initiatives in other areas have attempted to contract or eliminate judicial expansion of tort liability.[45]

Early California cases adhered to the exclusive remedy rule.[46] Today California courts remain unwilling to allow tort remedies in every situation in which the employer's conduct could be characterized as intentional.[47] The courts, however, have carved out three exceptions to the exclusivity rule. These exceptions correspond roughly to three ar-

---

1-60 (1974), which makes the right to recover compensation "the exclusive remedy against any officer, agent or employee of the employer").

44. *See* J. MASTORIS, CIVIL LITIGATION AND WORKERS COMPENSATION vi (1980); "The legislature has been slow to act. Thus, decisional law may be the only remedy available in the future."

45. In 1978, the Legislature expressly overruled California Supreme Court decisions imposing "tavern-keeper's liability." 1978 Cal. Stats. ch. 929, § 1, at 2903; CAL. BUS. & PROF. CODE § 25602 (West Supp. 1981); *see* Coulter v. Superior Court, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978); Bernhard v. Harrah's Club, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215, *cert. denied*, 429 U.S. 859 (1976); Vesely v. Sager, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971). The California Supreme Court reluctantly upheld § 25602 against a constitutional challenge in Cory v. Shierloh, 29 Cal. 3d 430, 629 P.2d 8, 174 Cal. Rptr. 500 (1981). "[O]ur constitutional inquiry does not seek to determine whether the 1978 amendments were or are wise, sound, necessary, or in the public interest. There are ample reasons for concluding otherwise." *Id.* at 437, 629 P.2d at 12, 174 Cal. Rptr. at 504. The court concluded that "[w]ith effort, a reasonable basis for the 1978 amendments may be found." *Id.* at 441, 629 P.2d at 14, 174 Cal. Rptr. 506.

An attempt to repeal the landmark "market-share liability" decision in Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980), failed in the California State Assembly after passing the State Senate. Brickley, *Trial Bar Wards Off Drive to Dump Sindell*, S.F. Recorder, Aug. 28, 1980, at 1, col. 5.

A bill introduced by Assemblyman Howard Berman in the California Legislature for the 1981-82 Regular Session would drastically alter the current compensation law by allowing suits against the employer when:

(a) The injury or death is caused by a defective product manufactured by the defendant.

(b) The injury or death is caused by services negligently furnished by the defendant.

(c) The injury or death results from the aggravation of a condition by failure to notify the injured person, his or her physician, or the appropriate state agency of the condition and its relationship to the employment. (This would seemingly apply to the *Johns-Manville* situation.)

(d) The injury or death was caused by the gross negligence or willful misconduct of the defendant.

(e) The injury or death is a result of the defendant's knowingly ordering a person to work in an unsafe environment and concealing the risk of injury from that person. Cal. A.B. 2031 (1981) (proposed CAL. CIV. CODE § 1714.7).

At publication, no hearings had been scheduled on the bill. Its chances of passage, at least in its original form, were considered very slight.

46. *See, e.g.*, Buttner v. American Bell Tel. Co., 41 Cal. App. 2d 581, 107 P.2d 439 (1940); DeCarli v. Associated Oil Co., 57 Cal. App. 310, 207 P. 282 (1922).

47. Johns-Manville Products Corp. v. Superior Court, 27 Cal. 3d 465, 474, 612 P.2d 948, 953-54, 165 Cal. Rptr. 858, 863 (1980). *See also* Busick v. Workmen's Compensation

eas in which the exclusivity issue often arises: assault and battery,[48] intentional infliction of emotional distress,[49] and concealment of a known industrial disease or hazard.[50] This Note examines these three areas to determine whether the exclusivity rule should be abrogated.

Assault and Battery

The first major departure from the exclusive remedy doctrine in California occurred in 1951, in *Conway v. Globin*.[51] The Third District Court of Appeal held that, because injuries resulting from a willful attack did not arise out of the employment relationship and because such an attack was not a risk or condition of the employment, the employee could maintain a common-law tort suit against the employer. To hold otherwise, the court said, "would be not only to sanction indirectly conduct of the employer which is both tortious and criminal, but also would be to permit the employer to use the Workmen's Compensation Act to shield him from his larger civil liability."[52]

Only five years later, however, the Second District Court of Appeal, in *Carter v. Superior Court*,[53] rejected the notion that an assault could not arise out of the employment relationship. The court found instead that an employee who is assaulted has a choice of remedies: the employee either may assert that the injury was employment-related and seek workers' compensation, or may seek damages in an action at law, asserting that the injury did not arise out of the employment.[54] The employee, however, cannot collect both damages and compensation; if he or she establishes that the injury occurred by reason of a risk incident to the employment, compensation is the exclusive remedy. If it is established that the injury did not arise out of the employment, then only the courts can grant relief.[55] As the plaintiff in *Carter* had

Appeals Bd., 7 Cal. 3d 967, 975 n.11, 500 P.2d 1386, 1393 n.11, 104 Cal. Rptr. 42, 48 n.11 (1972).

48. *See* Magliulo v. Superior Court, 47 Cal. App. 3d 760, 121 Cal. Rptr. 621 (1975).

49. *See* McGee v. McNally, 119 Cal. App. 3d 891, 174 Cal. Rptr. 253 (1981); Renteria v. County of Orange, 82 Cal. App. 3d 833, 147 Cal. Rptr. 447 (1978); *cf.* Unruh v. Truck Ins. Exch., 7 Cal. 3d 616, 498 P.2d 1063, 102 Cal. Rptr. 815 (1972) (intentional infliction of emotional distress by insurer).

50. *See* Johns-Manville Products Corp. v. Superior Court, 27 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (1980).

51. 105 Cal. App. 2d 495, 233 P.2d 612 (1951).

52. *Id.* at 498, 233 P.2d at 614.

53. 142 Cal. App. 2d 350, 298 P.2d 598 (1956).

54. *Id.* at 355, 298 P.2d at 601.

55. *Id.* This reasoning followed that of the California Supreme Court in Scott v. Industrial Accident Comm'n, 46 Cal. 2d 76, 293 P.2d 18 (1956), decided four months earlier: "[T]he only point of concurrent jurisdiction of the two tribunals appears to be *jurisdiction to determine jurisdiction*; jurisdiction once determined will be exclusive, not concurrent." *Id.* at 83, 293 P.2d at 22 (emphasis in original).

already received a final award from his employer's compensation carrier, he was precluded from pursuing a legal remedy against his employer.[56]

In *Azevedo v. Abel*,[57] the Third District Court of Appeal found that an employer's intentional tort could not give rise to a common-law suit. In *Azevedo*, the employee of a retail dress shop was injured by her employer, who was angered when he learned of a conversation she had had with a customer.[58] The employee first filed a claim for compensation benefits, which was denied when the Industrial Accident Commission held that it lacked jurisdiction to award benefits for an injury intentionally inflicted by an employer. The appellate court, in *Azevedo v. Industrial Accident Commission*,[59] reversed the compensation board's decision, holding that a job-related, albeit intentionally inflicted, injury is compensable.[60]

Seeking compensatory and punitive damages, Mrs. Azevedo also filed a suit in superior court. The court dismissed the action, holding that workers' compensation was the exclusive remedy under California Labor Code section 3601.[61] In *Azevedo v. Abel*, the court of appeal held that workers' compensation must remain the exclusive remedy even when intentional torts have been committed. Any other holding would be permissible "only by carving a judicial exception in an uncarved statute,"[62] and would relegate the employee "to the dubious benefit of a lawsuit he may lose."[63] The court noted:

> The theory which poses a civil action as a sanction against deliberate torts is enfeebled by the compensation law's penalty for serious and willful misconduct. Neither moral aversion to the employer's act nor the shiny prospect of a large damage verdict justifies interference with what is essentially a policy choice of the Legislature. The policy choice is to provide employees economic insurance against disability in exchange for the speculative possibility of general damages; to offer the augmented award for serious and willful misconduct in trade for the relatively rare award of punitive damages.[64]

The *Azevedo* court's decisive rejection of common-law suits, and ac-

56. Carter v. Superior Court, 142 Cal. App. 2d 350, 355, 298 P.2d 598, 601 (1956).

57. 264 Cal. App. 2d 451, 70 Cal. Rptr. 710 (1968).

58. *Id.* at 453, 70 Cal. Rptr. at 711. *See* Note, *Azevedo v. Abel: Denial of Employee's Right to Sue His Employer for an Intentional Tort*, 21 HASTINGS L.J. 683, 687 (1970).

59. 243 Cal. App. 2d 370, 52 Cal. Rptr. 283 (1966).

60. *Id.* at 376-77, 52 Cal. Rptr. at 287-88. The court disapproved its earlier decision in Conway v. Globin, 105 Cal. App. 2d 495, 233 P.2d 612 (1951).

61. CAL. LAB. CODE § 3601 (West Supp. 1981) provides in part: "Where the conditions of compensation exist, the right to recover such compensation, pursuant to the provisions of this division is . . . the exclusive remedy for injury or death of an employee against the employer . . . ." See notes 35-36 & accompanying text *supra*.

62. 264 Cal. App. 2d at 459, 70 Cal. Rptr. at 715.

63. *Id.*

64. *Id.* at 459-60, 70 Cal. Rptr. at 715.

ceptance of compensation benefits for intentionally inflicted injuries, was thought to have settled this area of the law.[65]

The exclusivity issue, however, was not resolved. In *Magliulo v. Superior Court*,[66] the First District Court of Appeal concluded that *Azevedo v. Abel* had been wrongly decided[67] and that an intentional assault could support a common-law action for damages. Analyzing California Labor Code section 4553,[68] which provides a fifty percent increase in benefits for serious and willful misconduct, the court concluded that the statute should be applied only if the misconduct falls between ordinary negligence and an intentional act. When the employer's conduct rises to the level of an intentional tort, a suit should be permitted because an intentional assault "is of questionable relationship to general conditions of employment."[69] The court held that, at least until an award of workers' compensation benefits is made, or until a civil suit judgment is recovered, the compensation and common law remedies may be treated as cumulative, or alternative.[70]

Magliulo created a conflict among the California courts of appeal over whether compensation is the exclusive remedy for an on-the-job assault. Subsequent cases have failed to resolve the conflict.[71] Although assaults may be of questionable relationship to employment, an assault and battery may arise out of an employer's dissatisfaction with an employee's work.[72] In this situation, the assault may be as closely related to the job as an accident stemming from the use of a machine.

65. *See* Note, *Azevedo v Abel: Denial of Employee's Right to Sue His Employer for an Intentional Tort*, 21 HASTINGS L.J. 683, 690 (1970).

66. 47 Cal. App. 3d 760, 121 Cal. Rptr. 621 (1975).

67. "If we were to consider the question as one of first impression we would conclude that the contention advanced by Mrs. Azevedo is a preferable solution." *Id.* at 777, 121 Cal. Rptr. at 633-34.

68. CAL. LAB. CODE § 4553 (West Supp. 1981).

69. *Id.* at 779, 121 Cal. Rptr. at 635.

70. 47 Cal. App. 3d at 780, 121 Cal. Rptr. at 636.

71. Meyer v. Graphic Arts Int'l Union Local No. 63-A, 63-B, 88 Cal. App. 3d 176, 151 Cal. Rptr. 597 (1979) followed *Magliulo* in allowing a suit for assault, battery, false imprisonment, and rape. *Johns-Manville* expressly refused to resolve the conflict between *Magliulo* and *Azevedo* regarding an employee's right to sue for a physical assault related to the employment: "That issue is not presented in this case, and we do not purport to address it." 27 Cal. 3d at 477 n.11, 612 P.2d at 956 n.11, 165 Cal. Rptr. at 865 n.11. *Johns-Manville* did, however, approve of the cumulative remedy approach for aggravation of a job-related disease. *Id.* at 478-79, 612 P.2d at 956, 165 Cal. Rptr. at 866.

72. *See, e.g.*, Azevedo v. Abel, 264 Cal. App. 2d 451, 70 Cal. Rptr. 710 (1968), in which the employer's assault apparently stemmed from his anger about a conversation the employee had had with a customer. *Cf.* Busick v. Workmen's Compensation Appeals Bd., 7 Cal. 3d 967, 500 P.2d 1386, 104 Cal. Rptr. 42 (1972) (employer's assault and battery of employees who had started a competing business did not arise out of employment; $650,000 civil suit judgment precluded award of compensation); Magliulo v. Superior Court, 47 Cal. App. 3d 760, 762-63, 121 Cal. Rptr. 621, 623 (1975) (injury arose out of argument in kitchen).

Courts have been reluctant to inquire in each case whether the assault arose from a purely personal grievance or from a job-related dispute. The common solution has been to set forth a broad rule governing all assaults.[73] In California, however, because of the conflict between *Azevedo* and *Magliulo*, no general rule on assaults has emerged.

In all assaults and batteries, the conduct is intentional and should be discouraged.[74] Limiting an assaulted worker to the compensation remedy indirectly sanctions "conduct of the employer which is both tortious and criminal."[75] It permits the employer to avoid civil liability and to assault with impunity.[76] If courts analyzed the assault cases in terms of public policy, they would avoid case-by-case determinations of whether a tort arose out of the employment. By deciding whether the conduct alleged is assault and battery, courts can decide whether the conduct gives rise to a common-law cause of action.

Arguably, plaintiffs, by artful pleading, can avoid exclusivity simply by alleging an assault and battery in even the most routine cases. However, by requiring that the employer, rather than an agent of the employer, commit the act, courts can minimize the frequency of this allegation.[77] In the rare situation in which an employer commits an actual, intentional assault and battery on an employee, the employer should not be able to insure against liability for the conduct.

The policy of deterring intentional wrongs was rejected in *Azevedo v. Abel*.[78] The *Azevedo* court reasoned that the provision for a fifty-percent penalty for serious and willful misconduct,[79] in addition to the prohibition of insuring against liability for this misconduct,[80] ade-

73. *See* 2A LARSON, *supra* note 18, at § 68.21.

74. Professor Larson states that an intentional assault on the employee by an employer, who acts in person and not constructively through an agent, grounds a common-law suit. According to Professor Larson, the best theory in support of this result is that an intentional assault is not an "accident." 2A LARSON, *supra* note 18, at § 68.11. In California, however, compensation benefits are not conditioned on an "accident," so this theory is not persuasive. Some courts have resorted to "resounding moralistic pronouncements" to justify exceptions to the exclusivity rule. *Id.*

75. Conway v. Globin, 105 Cal. App. 2d 495, 498, 233 P.2d 612, 614 (1951).

76. "It would be anomalous to permit a defendant which, as in this case, acting through its officer, assaulted the plaintiff herein, to say, 'I can assault you with impunity and the only remedy you have is to take Workmen's Compensation which I have provided for you.' " Garcia v. Gusmack Restaurant Corp., 150 N.Y.S.2d 232, 233 (N.Y. City Ct. 1954), *cited in* 2A LARSON, *supra* note 18, at § 68.11.

77. *See* 2A LARSON, *supra* note 18, at § 68.11. The importance of pleading is demonstrated in McGee v. McNally, 119 Cal. App. 3d 891, 174 Cal. Rptr. 253 (1981). See notes 93-94 & accompanying text *infra*.

78. 264 Cal. App. 2d 451, 70 Cal. Rptr. 710 (1968). See text accompanying notes 57-64 *supra*.

79. CAL. LAB. CODE § 4553 (West Supp. 1981).

80. CAL. INS. CODE § 11661 (West 1972).

quately served the public policy against insuring for intentional wrongs.[81] Moreover, the court suggested that the fifty-percent penalty is a sufficient deterrent and an adequate substitute for the "relatively rare" award of punitive damages.[82]

The *Azevedo* court's reasoning, however, is no longer valid. First, the serious and willful misconduct penalty, at fifty percent of the compensation award up to a maximum of $10,000, no longer poses a sufficient deterrent to intentional misconduct.[83] Second, in cases in which the damage inflicted by an assault and battery consists primarily of an affront to dignity rather than a physical injury resulting in lost wages, a penalty tied to compensation is an inadequate penalty. Damages suits are a more effective deterrent and a more direct way of compensating victims. Third, as the California courts have noted, in some cases the tort has little relation to the employment and the injury is not caused by the employment.[84] Finally, as an employee who is assaulted can sue a co-worker, a customer, or a supervisor, there is no valid reason to bar a suit against the employer.[85]

Intentional Infliction of Emotional Distress

A second major area in which the exclusivity issue often arises is the tort of intentional infliction of emotional distress. The problem of whether workers' compensation covers this tort has arisen frequently in the last few years, and, as is the case with assault and battery, lower courts have divided on whether the exclusive remedy rule should apply.[86]

In cases involving extreme and outrageous intentional invasions of mental and emotional tranquility, a plaintiff can recover for mental suffering alone, even though no physical injuries occurred.[87] The Cali-

81. 264 Cal. App. 2d at 458, 70 Cal. Rptr. at 714.

82. *Id.* at 459-60, 70 Cal. Rptr. at 715.

83. CAL. LAB. CODE § 4553 (West Supp. 1981) also provides a $250 ceiling on costs and expenses that can be awarded pursuant to that section. While this attempt to limit the cost of securing an award is laudatory, it further serves to minimize the punitive effect of the section.

84. Magliulo v. Superior Court, 47 Cal. App. 3d at 779, 121 Cal. Rptr. at 635; Conway v. Globin, 105 Cal. App. 2d at 498, 233 P.2d at 614.

85. The victim of a work-related assault can sue a customer or other third party, CAL. LAB. CODE § 3852 (West 1971), or a fellow worker or supervisor. CAL. LAB. CODE § 3601(a)(1) (West Supp. 1981). *See* Magliulo v. Superior Court, 47 Cal. App. 3d at 777, 121 Cal. Rptr. at 634.

86. *Compare* McGee v. McNally, 119 Cal. App. 3d 891, 174 Cal. Rptr. 253 (1981) (suit allowed); Lagies v. Copley, 110 Cal. App. 3d 958, 168 Cal. Rptr. 368 (1980) (same); Renteria v. County of Orange, 82 Cal. App. 3d 833, 147 Cal. Rptr. 447 (1978) (same) *with* Gates v. Trans Video Corp., 93 Cal. App. 3d 196, 155 Cal. Rptr. 486 (1979) (suit barred); Ankeny v. Lockheed Missiles and Space Co., 88 Cal. App. 3d 531, 151 Cal. Rptr. 828 (1979) (same).

87. Alcorn v. Anbro Eng'r, Inc., 2 Cal. 3d 493, 468 P.2d 216, 86 Cal. Rptr. 88 (1970);

fornia Supreme Court in 1970, without discussing the exclusivity issue, held that, because of his or her status as an employee, a plaintiff is entitled to greater protection from outrageous conduct than is a stranger to the employer.[88]

The first California case to address the question of the exclusive remedy in the emotional distress context was *Renteria v. County of Orange*,[89] in which the plaintiff alleged that his employer and fellow employees had subjected him to racial discrimination and harassment with the intent to cause him emotional distress.[90] The plaintiff had suffered no physical injuries, and thus could receive no compensation benefits. The court concluded that the exclusivity rule should not bar his complaint, because it would be inequitable to leave him remediless.[91]

Within a year, however, *Renteria* was distinguished. Two court of appeal cases concluded that workers' compensation is the exclusive remedy when allegations of intentional infliction of emotional distress are accompanied by allegations of physical injury.[92] These cases distinguished intentional infliction of emotional distress with physical injuries from the same tort without physical injuries. This distinction was followed recently in *McGee v. McNally*,[93] in which the court allowed a tort suit despite "oblique reference to physical harm," concluding that the allegations of physical injury were only peripheral and added to the complaint as a "makeweight."[94]

The reasons for allowing a damage suit for intentional infliction of emotional distress differ from those advanced for allowing a damage suit for assault and battery. Assault and battery generally produce physical consequences for which workers' compensation benefits may be paid.[95] Intentional infliction of emotional distress, however, usually does not produce compensable physical injuries. When it does not, or when the physical injuries are merely peripheral to the primary claim, as in *McGee*, a damages suit should be allowed. Most cases involving

State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 240 P.2d 282 (1952), *cited in* Renteria v. County of Orange, 82 Cal. App. 3d 833, 840, 147 Cal. Rptr. 447, 451 (1978).

88. Alcorn v. Anbro Eng'r, Inc., 2 Cal. 3d 493, 498 n.2, 468 P.2d 216, 218 n.2, 86 Cal. Rptr. 88, 90 n.2 (1970).

89. 82 Cal. App. 3d 833, 147 Cal. Rptr. 447 (1978).

90. *Id.* at 835, 147 Cal. Rptr. at 477.

91. *Id.* at 838-42, 147 Cal. Rptr. at 450-52. *See generally* Larson, *Nonphysical Torts and Workmen's Compensation*, 12 CAL. W.L. REV. 1 (1975); Comment, *Intentional Employer Torts and Workers' Compensation: A Legal Morass*, 11 PAC. L.J. 187, 203 (1979).

92. Gates v. Trans Video Corp., 93 Cal. App. 3d 196, 205, 155 Cal. Rptr. 486 (1979); Ankeny v. Lockheed Missiles & Space Co., 88 Cal. App. 3d 531, 535, 151 Cal. Rptr. 828, 831 (1979).

93. 119 Cal. App. 3d 891, 174 Cal. Rptr. 253 (1981).

94. *Id.* at 894-95, 174 Cal. Rptr. at 255.

95. *See generally* Larson, *Nonphysical Torts and Workmen's Compensation*, 12 CAL. W.L. REV. 1, 12 (1975).

intentional infliction of emotional distress are likely to involve non-physical injuries, especially because the plaintiff need not show physical injuries to recover.[96] The holding in *Renteria*, that employee intentional infliction of emotional distress suits will be allowed if no physical injury has occurred, was implicitly approved by the California Supreme Court in *Johns-Manville*.[97] This principle seems sound and is likely to be followed.[98]

Intentional Exposure to and Concealment of Hazardous Conditions

The most troubling class of cases concerning the exclusive remedy issue is the employer's alleged concealment of hazardous conditions and substances. In an early case, *Buttner v. American Bell Telephone Co.*,[99] a California court of appeal set forth a general rule of nonliability, holding that a suit would not lie on charges that the employer misrepresented the nature of carbon tetrachloride by suggesting that it was harmless when in fact it was highly dangerous.[100] Early cases in other jurisdictions are generally in accord with *Buttner*.[101]

96. See note 87 & accompanying text *supra*.

97. 27 Cal. 3d at 475 n.9, 612 P.2d at 954 n.9, 165 Cal. Rptr. at 864 n.9.

98. In Lagies v. Copley, 110 Cal. App. 3d 958, 168 Cal. Rptr. 368 (1980), the Fourth District Court of Appeal allowed the plaintiff to bring a civil suit against his employer and co-workers, despite allegations in the complaint that physical disability accompanied the intentional infliction of emotional distress. *Id.* at 970, 168 Cal. Rptr. at 375. The court, however, also found that plaintiff avoided the exclusive remedy bar because he alleged the defendants had acted outside the course and scope of their employment. *Id.* at 969-70, 168 Cal. Rptr. at 374-75. Thus, the portion of the opinion regarding the right to sue despite allegations of physical injury is dicta and is not likely to detract from the weight of the other cases. McGee v. McNally, 119 Cal. App. 3d 891, 174 Cal. Rptr. 253 (1981), decided eight months after *Lagies*, ignored it while discussing *Renteria, Ankeny*, and *Gates*.

Arguably, common-law suits should be allowed in all cases of intentional infliction of emotional distress, including those alleging physical injury. If the employer's conduct is outrageous enough to cause severe emotional distress as well as resulting physical injury, the employee is just as deserving of redress as one who does not allege physical injury. The current case law, however, would bar the former from a tort suit, but not the latter. Because it is likely that this distinction will be adhered to in subsequent cases, careful pleaders may have to omit physical injury allegations purposely to circumvent the exclusive remedy rule.

The reasoning of *Renteria* and the distinction along physical injury/non-physical injury lines is criticized in J. MASTORIS, CIVIL LITIGATION AND WORKERS COMPENSATION 7-8 (1980). The author of this treatise, a workers' compensation judge, points out that the argument in *Renteria* that emotional distress must be accompanied by physical injuries as a condition for recovery in compensation cases is not accurate. The Workers' Compensation Appeals Board "has been handling intentional and negligent infliction of emotional distress for years." *Id.* at 8.

99. 41 Cal. App. 2d 581, 107 P.2d 439 (1940).

100. *Id.* at 584-86, 107 P.2d at 441.

101. *See, e.g.*, Boyd v. American Mut. Liab. Ins. Co., 11 So. 2d 102 (La. App. 1942) (fraudulent concealment of hazards of employment in a sugarhouse); Brooks v. American Mut. Liab. Ins. Co., 7 So. 2d 658 (La. App. 1942) (same); Bevis v. Armco Steel Corp., 86 Ohio App. 525, 93 N.E. 2d 33 (1949), *appeal dismissed per curiam*, 153 Ohio St. 366, 91 N.E.

The proliferation of toxic substances and hazardous chemicals in the workplace has given rise in recent years to many claims of concealment of hazardous conditions and substances. Because of the large number of potential plaintiffs, a consistent approach to the problem is essential.

Phrased in starkest terms, the issue in these cases is whether injuries produced by an employer's concealment of hazards are as deliberately inflicted as a punch in the nose.[102] In California, the issue is whether the employee is limited to workers' compensation benefits for such behavior, is entitled to a fifty-percent penalty because the conduct is "serous and willful misconduct," or is permitted to bring a common-law suit for intentionally inflicted injury.

Two kinds of conduct recur in the concealment area. The first involves the toleration of a dangerous condition, such as unguarded machinery. In this class of cases, the employer is aware of and "put[s] his mind"[103] to the existence of a hazard, but fails to do anything about it. This conduct has various labels: negligence, extreme negligence, recklessness, or intentional misconduct.[104] It may consist of a violation of a safety statute or order, which gives rise to additional workers' compensation benefits in some states.[105] It also usually meets the definition of serious and willful misconduct, leading to additional compensation in

2d 479 (1950), *cert. denied*, 340 U.S. 810 (1950) (plaintiff alleged his silicosis had been aggravated by employer's misrepresentation regarding medical examination). In a recent case, the court allowed the employee to sue for fraudulent concealment of a silicosis condition, on facts which it conceded were "almost identical" to *Bevis*, holding that Ohio's exclusive-remedy statute "does not bestow upon employers immunity from civil liability for their torts" because "[a] hazard of employment does not include the risk that the employer will deprive an employee of his workers' compensation rights to medical treatment and compensation." Delamotte v. Unitcast Div. of Midland Ross Corp., 64 Ohio App. 2d 159, 161-62, 411 N.E. 2d 814, 816 (1978) (citing OHIO REV. CODE ANN. § 4123.74 (Page 1973)). *See generally* 2A LARSON, *supra* note 18, at § 68.32.

102. *See* 2A LARSON, *supra* note 18, at § 68.13: "The intentional removal of a safety device or toleration of a dangerous condition may or may not set the stage for an accidental injury later. But in any normal use of the words, it cannot be said, if such an injury does happen, that this was deliberate infliction of harm comparable to an intentional left jab to the chin."

103. Johns-Manville Products Corp. v. Superior Court, 27 Cal. 3d at 474, 612 P.2d at 953, 165 Cal. Rptr. at 863. See text accompanying note 121 *infra*.

104. *Id.* The *Johns-Manville* decision suggests that such conduct could be called intentional or even deceitful. Professor Larson, however, states that knowingly permitting a hazardous work condition to exist falls short of inflicting an intentional injury. 2A LARSON, *supra* note 18, at § 68.13. Several cases have agreed with the Larson formulation. *See, e.g.*, Phifer v. Union Carbide Corp., 492 F. Supp. 483, 485 (E.D. Ark. 1980); Griffin v. George's, Inc., 267 Ark. 91, 96, 589 S.W. 2d 24, 27 (1979); Sanford v. Presto Mfg. Co., 92 N.M. 746, 748, 594 P.2d 1202, 1204 (1979).

105. See note 18 *supra*. *See also* E. Clemens Horst Co. v. Industrial Accident Comm'n, 184 Cal. 180, 193 P. 105 (1920).

California.[106]

The second, more serious, type of conduct involves a calculated deceit. The employer is charged with a conscious effort to mislead the employee about the nature of the material with which he or she works, and to prevent the employee from taking measures to protect his or her health. These cases often involve substances that act over a long period of time, produce insidious diseases, and affect large numbers of workers. The nature of the hazard in these cases is less apparent to the average worker than is a potentially dangerous malfunctioning machine.[107] A policy of concealing hazards, if it exists, allows dangerous conditions to continue. Because the employee is unaware of the condition, he or she will not insist on a safe workplace.[108] Moreover, if the employee is unaware that his or her disease is work-related, he or she may fail to apply for workers' compensation or to contemplate filing suit.[109] This conduct fits the classic definition of fraudulent concealment: "The hiding or suppression of a material fact or circumstances which the party is legally or morally bound to disclose. The employment of artifice planned to prevent inquiry or escape investigation and to mislead or

106. CAL. LAB. CODE § 4553 (West Supp. 1981) (50% up to $10,000); *see also* MASS. GEN. LAWS ANN. ch. 152, § 28 (Michie/Law. Co-op 1965) (100%). See note 18 *supra*.

107. *See generally* 2A LARSON, *supra* note 18, at § 68.13 (citing Duncan v. Perry Packing Co., 162 Kan. 79, 174 P.2d 78 (1946), in which plaintiff's wife was electrocuted by a machine which was improperly grounded and gave off electric shocks and flashes).

108. *See* Brief of Amicus Curiae Department of Industrial Relations in Reply to California Workers' Compensation Institute and in Support of Real Party in Interest at 18, Johns-Manville Products Corp. v. Superior Court, 27 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (on file with the *Hastings Law Journal*): "Where a danger is obvious to the employee, the employer's duty is no less, but at least the employee has the theoretical choice of refusing the hazardous work, and is protected in that choice by Labor Code § 6311, which prohibits retaliation for refusing unsafe work." Workers could also petition for better work conditions through their union, or even quit the job. *Id.* "Employers who willfully refuse to disclose the identity and hazards of toxic substances to which employees are exposed thereby frustrate the employee's and the Department's ability, through the employee's complaint, to achieve safer and healthier work conditions." *Id.*

109. Johns-Manville was charged with withholding or lying about the results of medical examinations. The *amicus* Department of Industrial Relations claimed that this was done to deny employees access to workers' compensation benefits. *Id.*

The allegation that a company or its doctors would be less than candid when informing, or not informing, an employee about his or her physical condition has also been made in professional sports. Berkow, *Permanent Injury: Pro Sports' Darker Side*, S.F. Chronicle, July 6, 1981, at 41, 46, col. 3, tells the story of Detroit Lions football star Charlie Sanders, who was allegedly told he had "nothing to worry about" after suffering serious game-related injuries. This article also claims that most football players are unaware of their rights under the workers' compensation laws, despite the hazardous nature of their profession. *See* Ellis v. Rocky Mountain Empire Sports, Inc., 602 P.2d 895 (Colo. App. 1979) (intentional tort claim barred; exclusive remedy); Gambrell v. Kansas City Chiefs Football Club, Inc., 562 S.W. 2d 163 (Mo. App. 1978) (suit alleging fraud and deceit in misrepresenting employee's physical condition barred by exclusive remedy rule because resulting injury covered by workers' compensation).

hinder the acquisition of information disclosing a right of action."[110]

Although these cases were relatively rare in the past, litigation involving substances such as hydrogen sulfide,[111] pesticides,[112] and asbestos[113] is increasing. Potential cases include those involving cancer caused by nuclear or microwave radiation.[114] The number of substances and industries affected by this issue is large, as is the number of workers affected in each.[115]

Serious and Willful Misconduct

In states that allow, either by statute or by case law, a suit against an employer who intentionally injures an employee, courts have strictly construed the requirement of intention, especially when the employer's action consisted of exposing the worker to hazards rather than of an assault and battery.[116] A California worker, however, must surmount a further obstacle to suit: the provision for added compensation in cases of serious and willful misconduct.[117]

The first detailed California discussion of the serious and willful provision was in 1920, in *E. Clemens Horst Co. v. Industrial Accident Commission*.[118] In *Horst*, the worker was injured when her hair was caught by a revolving shaft. An award of $4.45 per week was made by the Industrial Accident Commission, predecessor of the current Work-

110. BLACK'S LAW DICTIONARY 596 (5th ed. 1979). Although material facts are known to one party and not to the other, failure to disclose them is not actionable fraud unless a fiduciary relationship exists, giving rise to a duty to disclose. Active concealment of facts, however, may be fraudulent. 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW 2724-25 (8th ed. 1973). Conduct seeking to conceal or prevent investigation and discovery of material facts is worse than a failure to disclose. *Id.* at 2727. If the defendant alone has knowledge of material facts that are not accessible to the plaintiff, a duty to disclose may arise without any confidential relationship. *Id.* at 2726. An employer-employee relationship arguably gives rise to a legal or moral duty to disclose.

111. *E.g.*, Phifer v. Union Carbide Corp., 492 F. Supp. 483 (E.D. Ark. 1980).

112. *E.g.*, Wright v. FMC Corp., 81 Cal. App. 3d 777, 146 Cal. Rptr. 740 (1978).

113. See note 6 & accompanying text *supra*.

114. *See generally* Parker v. Employers Mut. Liab. Ins. Co., 440 S.W. 2d 43 (Tex. 1969) (no evidence presented in workers' compensation case that employee, who worked for four and one-half years handling nuclear weapons material, contracted fatal cancer on the job).

115. The stakes are so high that the defense bar has warned that abrogation of exclusivity would open a "Pandora's box." Amicus Curiae Brief of California Workers' Compensation Institute in Support of Respondent at 50-51, Johns-Manville Products Corp. v. Superior Court, 27 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (on file with the *Hastings Law Journal*).

116. *See, e.g.*, Phifer v. Union Carbide Corp., 492 F. Supp. 483 (E.D. Ark. 1980) (Arkansas law); Petruska v. Johns-Manville, 83 F.R.D. 39 (E.D. Pa. 1979) (New Jersey law); Griffin v. George's, Inc., 267 Ark. 91, 589 S.W.2d 24 (1979); Sanford v. Presto Mfg. Co., 92 N.M. 746, 594 P.2d 1202 (1979).

117. CAL. LAB. CODE § 4553 (West Supp. 1981).

118. 184 Cal. 180, 193 P. 105 (1920).

ers' Compensation Appeals Board, because of the employer's serious and willful misconduct.[119] The California Supreme Court upheld the award, noting that the shaft was unguarded in violation of a safety statute, and that there were no warning signs near the machine.[120]

The court defined serious and willful misconduct as "conduct which the employer either knew, or ought to have known, if he had turned his mind to the matter, to be conduct likely to jeopardize the safety of his employees."[121] Circumstances surrounding the act had to "evince a reckless disregard for the safety of others and a willingness to inflict the injury complained of."[122] The court also noted that the award should be considered compensation, not exemplary damages, because the basic compensation award "covers not the whole, but only a part or a percentage of such loss."[123]

The *Horst* formula, "conduct likely to jeopardize the safety of his employees" and circumstances evincing a "reckless disregard" for safety, was left undisturbed until 1953, when the California Supreme Court, in *Mercer-Fraser Co. v. Industrial Accident Commission*,[124] impliedly imposed higher standards of proof. Concluding that the employer was not guilty of serious and willful misconduct for its failure to brace the prefabricated parts of a building that collapsed,[125] the court quoted several possible definitions of serious and willful misconduct. Some definitions were similar to the *Horst* formula, but others likened serious and willful misconduct to conduct of a "*quasi* criminal nature"[126] and gave assault and battery as examples of willful misconduct.[127] The court concluded that serious and willful misconduct referred to "an act deliberately done for the express purpose of injuring another, or intentionally performed either with knowledge that serious injury is a probable result or with a positive, active, wanton, reckless and absolute disregard for its possibly damaging consequences."[128]

The *Mercer-Fraser* decision has been used both to justify and to annul findings of serious and willful misconduct. In *Rogers Materials*

119. *Id.* at 182-83, 193 P. at 106.

120. *Id.* at 184-85, 193 P. at 106-07.

121. *Id.* at 188, 193 P. at 108.

122. *Id.* at 189, 193 P. at 109 (quoting Louisville N.A. & C. Ry. v. Bryan, 107 Ind. 51, 53, 7 N.E. 807, 808 (1886)).

123. *Id.* at 193, 193 P. at 110 (citing Western Indemnity Co. v. Pillsbury, 170 Cal. 693, 151 P. 398 (1915)).

124. 40 Cal. 2d 102, 251 P.2d 955 (1953).

125. *Id.* at 107, 251 P.2d at 956-57.

126. *Id.* at 117, 251 P.2d at 962 (quoting Porter v. Hofman, 12 Cal. 2d 445, 447-48, 85 P.2d 447, 448 (1938)).

127. *Id.* at 116, 251 P.2d at 962 (quoting Donnelly v. Southern Pac. Co., 18 Cal. 2d 863, 869-70, 118 P.2d 465, 468 (1941)).

128. *Id.* at 120, 251 P.2d at 964.

Co. v. Industrial Accident Commission,[129] the court held that failure to take precautions, even when the employer's representative had warned the employee of the danger, would support a finding of serious and willful misconduct.[130] In so holding, the court restated one of the formulations of *Mercer-Fraser*: "[A]n employer may be found guilty of wilful misconduct when he has 'put his mind' to the existence of a danger to an employee and fails to take precautions to avert it."[131] The lower courts, following these decisions, have found no serious and willful misconduct when the employer was unaware of previous mishaps with machinery,[132] and when the employer was aware of a safety problem, but took only cursory and unsuccessful measures to solve it.[133]

The courts have also distinguished between an intentional act or an intentional failure to act, which is not intended to cause injury,[134] and an intentionally inflicted injury.[135] The former can give rise to a finding of serious and willful misconduct. The latter is an intentional tort. A sensible distinction can be made between intentional acts in which the employer knows the likely consequences of his or her acts—but does not intend them—and acts that are intended to cause or are substantially certain to cause injury.[136]

Although it has been argued that the legislative intent in enacting the serious and willful misconduct provision was to bar intentional tort suits,[137] the California compensation law grants benefits "irrespective

129. 63 Cal. 2d 717, 408 P.2d 737, 48 Cal. Rptr. 129 (1965).

130. *Id.* at 724-25, 408 P.2d at 742, 48 Cal. Rptr. at 134.

131. *Id.* at 723, 408 P.2d at 741, 48 Cal. Rptr. at 133.

132. *See* American Smelting & Refining Co. v. Workers' Compensation Appeals Bd., 79 Cal. App. 3d 615, 144 Cal. Rptr. 898 (1978).

133. Johns-Manville Sales Corp. Private Carriage v. Workers' Compensation Appeals Bd., 96 Cal. Ap. 3d 923, 933, 935, 158 Cal. Rptr. 463, 468, 469 (1979) (two consolidated actions: first, employer, informed that workers might trip and fall on hoses in the dark, failed to keep yard properly lighted; second, employer failed to repair leaking ice machine that made floor slippery).

134. *See, e.g.*, Johns-Manville Sales Corp. Private Carriage v. Workers' Compensation Appeals Bd., 96 Cal. App. 3d 923, 933, 158 Cal. Rptr. 463, 468 (1979) (no serious and willful misconduct found).

135. Magliulo v. Superior Court, 47 Cal. App. 3d 760, 769, 121 Cal. Rptr. 621, 628 (1975) (suit allowed for assault). For a more complete discussion of *Magliulo*, see notes 66-72 & accompanying text *supra*.

136. *See* Mandolidis v. Elkins Indus., Inc., 246 S.E.2d 907, 914 n.9 (W. Va. 1978). *But see* Griffin v. George's, Inc., 267 Ark. 91, 95, 589 S.W.2d 24, 26 (1979). *See generally* W. PROSSER, THE LAW OF TORTS § 8A (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 8 (1965). The distinction suggested here was not accepted in *Johns-Manville*. *See* 27 Cal. 3d at 472-74, 612 P.2d at 952-54, 165 Cal. Rptr. at 862-83 (1980). Professor Larson calls the West Virginia court's holding in *Mandolidis*, that a worker can sue the employer for willful, wanton, and reckless misconduct, "distinctly out-of-line." 2A LARSON, *supra* note 18, at § 68.13 (1981 Supp. at 59).

137. Johns-Manville Products Corp. v. Superior Court, 27 Cal. 3d at 471-72, 612 P.2d at 951-52, 165 Cal. Rptr. at 861-62.

of the fault of any party"[138] and "without regard to negligence."[139] Arguably, then, the compensation law was intended to bar civil suits only for negligence, not for intentional torts. Moreover, section 3600(g) of the California Labor Code bars compensation for an injury arising out of an altercation in which the injured employee is the "initial physical aggressor."[140] This section thus suggests that intentional wrongs are not, or should not be, exclusively covered by the compensation system.

Even if courts fully recognize legislative intent, they cannot ignore considerations of culpability. The provision for additional compensation in cases of serious and willful misconduct requires courts to consider culpability.[141] Allowing common-law tort suits in rare instances of aggravated employer malfeasance would be a logical extension of these culpability considerations.

Finally, although the serious and willful misconduct provision was designed to provide a fuller measure of compensation than does the normal award of benefits,[142] compensation benefits are woefully inadequate in certain instances,[143] and both the award of additional compensation and a common-law suit should be available in those instances.

Johns-Manville and the Three-Tiered Approach

The California Supreme Court in *Johns-Manville* held that the se-

138. 1917 Cal. Stats. ch. 586, § 1, at 832.

139. CAL. LAB. CODE § 3600 (West Supp. 1981).

140. CAL. LAB. CODE § 3600(g) (West Supp. 1981). In Mathews v. Workmen's Compensation Appeals Bd., 6 Cal. 3d 719, 493 P.2d 1165, 100 Cal. Rptr. 301 (1972), the California Supreme Court upheld the validity of § 3600(g). The court analyzed at length the origin of the compensation act and concluded that nothing forbids the legislature from conditioning compensation on the absence of intentional wrongdoing. It found that "fault" and "negligence" are equivalent. *Id.* at 734-35, 493 P.2d at 1175-76, 100 Cal. Rptr. at 311-12.

141. *See* Rogers Materials Co. v. Industrial Accident Comm'n, 63 Cal. 2d 717, 726, 408 P.2d 737, 743, 48 Cal. Rptr. 129, 135 (1965) (court rejected employer's contention that, "no matter how culpable an employer's conduct may be, he cannot be found guilty of wilful misconduct simply because his act or omission coincided with his violation of a safety order of which he had no prior knowledge"). *But see* Johns-Manville Products Corp. v. Superior Court, 27 Cal. 3d at 474, 612 P.2d at 953, 165 Cal. Rptr. at 863 (1980) (warning that to focus on "state of knowledge" of dangerous conditions "would undermine the underlying premise upon which the workers' compensation system is based"). *See also* Foley v. Polaroid Corp., ___ Mass. ___, 413 N.E.2d 711, 716 (1980) (quoting Gambrell v. Kansas City Chiefs Football Club, Inc., 562 S.W.2d 163, 168 (Mo. App. 1978)): "[T]he key to whether the Workmen's Compensation Act precludes a common law right of action lies in the nature of the injury for which plaintiff makes claim, not the nature of the defendant's act which the plaintiff alleges to have been responsible for that injury." *Foley* barred a claim for intentional infliction of emotional distress, because compensation benefits could be paid, but allowed claims for defamation, malicious prosecution, violation of civil rights, and loss of consortium.

142. *See* E. Clemens Horst Co. v. Industrial Accident Comm'n, 184 Cal. at 193, 193 P. at 110, discussed in notes 118-23 & accompanying text *supra*.

143. See notes 32-42 & accompanying text *supra*.

rious and willful provision precludes a common-law remedy for employees injured "in the first instance" as the result of a deliberate failure to assure workplace safety.[144] In considering allegations of "flagrant"[145] conduct, however, the court discussed cases that have allowed damages suits,[146] and found a "trend" towards allowing a common-law action in two situations: when the employer acts deliberately for the purpose of injuring an employee, and when the harm resulting from the intentional misconduct consists of aggravation of a work-related injury.[147] The court, however, expressly refused to resolve the conflict between *Magliulo* and *Azevedo*[148] over an employee's right to sue his or her employer for an assault.[149] Moreover, the court failed to resolve the issue of an employee's right to sue for intentional infliction of emotional distress, although it appeared to approve of the cases allowing the employee to sue when physical injury is not alleged but barring suit when physical injury accompanies emotional distress.[150]

Johns-Manville broadens the availability of suit for cases in which concealment of industrial hazards is alleged. Although the court's holding is a narrow one,[151] allowing a suit only for aggravation of, and not for contracting, the disease, any employee who has contracted an insidious disease and alleges that the employer concealed the cause and the existence of the disease will probably be able to survive a demurrer. Thus, in cases in which the employer can be charged with a calculating cover-up of an existing disease,[152] exclusivity will no longer bar common-law suits. Furthermore, by placing the burden of apportioning damages between contracting the disease and aggravating it on the defendant,[153] the court facilitates a plaintiff's recovery.

Johns-Manville does not, however, affect cases involving toleration of dangerous conditions.[154] The remedy for unguarded machinery and

144. 27 Cal. 3d at 474, 612 P.2d at 954, 165 Cal. Rptr. at 863.

145. *Id.* at 478, 612 P.2d at 956, 165 Cal. Rptr. at 866.

146. *Id.* at 475-76, 612 P.2d at 954-55, 165 Cal. Rptr. at 864-65.

147. *Id.* at 476, 612 P.2d at 955, 165 Cal. Rptr. at 865.

148. See notes 57-85 & accompanying text *supra*.

149. 27 Cal. 3d at 477 n.11, 612 P.2d at 956 n.11,165 Cal. Rptr. at 865 n.11. The court's July 3, 1980 slip opinion was modified on August 28, 1980 to include the first paragraph of footnote 11. The modification persuaded Justice Wiley Manuel, who had originally written a concurring and dissenting opinion criticizing the court for purporting to resolve the *Azevedo-Magliulo* dispute, to join the court's opinion. *See* 27 Cal. 3d at 488.

150. 27 Cal. 3d at 475 n.9, 612 P.2d at 954 n.9, 165 Cal. Rptr. at 864 n.9.

151. *See* J. MASTORIS, CIVIL LITIGATION AND WORKERS COMPENSATION, 11 (1980): "[T]he new tort cause of action created in [*Johns-Manville*] is narrow and limited. Only when 'compensation is available' would the fraudulent . . . [employer's] conduct create a civil cause of action."

152. See notes 107-15 & accompanying text *supra*.

153. Johns-Manville Products Corp. v. Superior Court, 27 Cal. 3d at 477 n.11, 612 P.2d at 956 n.11, 165 Cal. Rptr. at 865 n.11.

154. See notes 103-06 & accompanying text *supra*.

similar hazards is exclusively workers' compensation, buttressed by the serious and willful misconduct provision. Insofar as the court held that serious and willful misconduct encompasses "deliberate failure to assure that the physical environment of the work place is safe,"[155] it remained faithful to its precedents.[156]

The court in *Johns-Manville* impliedly established a three-tiered approach to culpability. (1) If the employer negligently subjects an employee to dangerous working conditions, compensation will be the exclusive remedy and no penalty will be imposed. (2) If, on the other hand, the employer "puts his mind" to a dangerous condition and fails to do anything about it, compensation is still the exclusive remedy but the employer will also be liable for the fifty-percent "serious and willful" addition.[157] (3) Finally, if the employer not only exposes workers to hazardous conditions but also actively conceals those conditions and the workers' disease, this "flagrant" conduct will justify a common-law suit.[158] This sensible approach takes proper account of culpability while preserving the statutory framework of the California compensation system. Despite the lack of explicit legislative authority for the holding, it is justified by considerations of public policy, the need to deter "rare instances of malicious oppression,"[159] inadequacy of the current compensation remedy in some situations, and the argument that the compensation act bars only negligence suits.[160]

The court, however, should not have allowed a cause of action only for aggravation of an existing job-related disease. This holding was based largely on *Unruh v. Truck Insurance Exchange*.[161] Reliance on *Unruh* is misplaced. In *Unruh*, there were two separate injuries. The first, a physical injury, arose out of the employment. The second, emotional distress inflicted by the employer's insurance carrier, did not arise out of the employment and was caused by events entirely separate from the initial, compensable injury.[162] Thus, in *Unruh*, it was reasonable to allow an action at law for "aggravation" of the initial injury, because the "aggravation" was a separate injury, with a distinct cause.[163]

155. 27 Cal. 3d at 474, 612 P.2d at 954, 165 Cal. Rptr. at 863.

156. See notes 116-31 & accompanying text *supra*.

157. See notes 124-31 & accompanying text *supra*.

158. Johns-Manville Products Corp. v. Superior Court, 27 Cal. 3d at 478, 612 P.2d at 956, 165 Cal. Rptr. at 866.

159. McGee v. McNally, 119 Cal. App. 3d 891, 895, 174 Cal. Rptr. 253, 256 (1981).

160. See notes 138-40 & accompanying text *supra*.

161. 7 Cal. 3d 616, 498 P.2d 1063, 102 Cal. Rptr. 815 (1972).

162. *Id.* at 620-21, 498 P.2d at 1066-67, 102 Cal. Rptr. at 818-19.

163. Professor Larson noted that in *Unruh* "there were two distinct injuries, rather than one; and . . . the dominant feature of the tort claim was not personal injury, but intangible emotional damage. . . . [T]he second injury was not a mere aggravation of the first, but was utterly different in kind. . . . [It] had nothing to do with an aggravation of the back condi-

In *Johns-Manville*, on the other hand, the plaintiff suffered from one continuing disease and alleged a continuing course of conduct—concealment. The alleged acts of concealment occurred both before the employee contracted the industrial disease (concealing and lying about the dangers of the workplace) and after he got the disease (concealing from the company doctor the existence of the disease and its cause).[164] The court drew an artificial line by allowing suit only for aggravation of the disease. Reliance on *Unruh* does not support the court's reasoning, either in logic or in precedent.[165] Although the court in *Johns-Manville* states that *Unruh* involved an "aggravation" of the initial injury, *Unruh* involved two distinct injuries,[166] whereas *Johns-Manville* involved only one.[167]

The court's distinction in *Johns-Manville* between causation and aggravation implies that the employer need not disclose workplace hazards to the employee. Under *Johns-Manville*, concealment of the initial hazards of the job will not support a common-law suit; only concealment of the disease will allow a suit for damages.[168] The court endeavored to minimize fears that its holding would result in limitless litigation,[169] but by limiting its holding, the court has given employers

tion." Larson, *Nonphysical Torts and Workmen's Compensation*, 12 CAL. W.L. REV. 1, 15-16 (1975). The court noted in *Unruh* that the plaintiff was seeking damages not for the initial industrial injury, but for injuries "subsequently occurring from entirely distinct events." 7 Cal. 3d at 637, 498 P.2d at 1078, 102 Cal. Rptr. at 830. One commentator, however, states that the court "conveniently overlooks the fact that in this very case the Appeals Board had already held the 'entirely distinct events' to arise out of the 'initial industrial injury' and to be fully compensable. Accordingly, the attempt semantically to avoid the impact of established precedent becomes a distinction without a significant difference." Hanna, *Exclusivity of Workmen's Compensation Remedy in Relation to Further Injury Resulting from Carrier's Nonmedical Investigation of Extent of Employee's Industrial Disability*, 5 SW. U.L. REV. 118, 132-33 (1973). Professor Larson, however, asserts that calling the second injury an aggravation of the first because the insurer's investigation related to the first requires accepting a "but-for theory that could lead to preposterous results." Larson, *Nonphysical Torts and Workmen's Compensation*, 12 CAL. W.L. REV. 1, 17 (1975).

164. Johns-Manville Products Corp. v. Superior Court, 27 Cal. 3d at 469, 612 P.2d at 950, 165 Cal. Rptr. at 860-61.

165. The Court's reliance on Ramey v. General Petroleum Corp., 173 Cal. App. 2d 386, 343 P.2d 787 (1959), is no more convincing than its reliance on *Unruh*. *Ramey* involved "a later injury which is separate from but related to the first injury." Johns-Manville Products Corp. v. Superior Court, 27 Cal. 3d at 476, 612 P.2d at 955, 165 Cal. Rptr. at 865. The "later injury" in *Ramey* was the employer's concealment of the fact that the employee had a cause of action against a third party. This concealment induced the employee to forego a tort action against the third party.

166. See note 163 *supra*.

167. See text accompanying note 164 *supra*.

168. 27 Cal. 3d at 477, 612 P.2d at 955, 165 Cal. Rptr. at 865.

169. "[W]e do not subscribe to the fears of defendant that a holding in plaintiff's favor would open up a Pandora's box of actions at law seeking damages for numerous industrial diseases." 27 Cal. 3d at 478, 612 P.2d at 956, 165 Cal. Rptr. at 866. Indeed, few employers

great latitude to expose workers to toxic substances.[170]

The court, however, could also have avoided unlimited litigation by requiring the employee to show active concealment, rather than non-disclosure, of workplace hazards.[171] This requirement would preserve a "three-tiered" approach to culpability by distinguishing those who "put their mind" to a danger and fail to correct it from those who actively seek to conceal or suppress information about the hazards of their industry, thereby preventing others from investigating and discovering dangers.[172] Under this approach, the employee would have to show that the employer actively concealed information or lied about the conditions of employment. If this were shown, the employee could recover for the initial injury.

Limiting damages suits to active or fraudulent concealment of workplace hazards would give greater protection to workers,[173] would avoid the artificial line drawn between causation and aggravation in *Johns-Manville*, and would still restrict the number of damages suits. In addition, this limitation would be consistent with a definition of intentional torts that includes those actions undertaken with the intent to injure or the intent to take an action substantially certain to cause injury.[174]

Conclusion

The uncertainty that surrounds California compensation law remains, despite the *Johns-Manville* decision. The question expressly left unresolved in *Johns-Manville*, whether an employer can be sued for assaulting and battering an employee, will be raised again. An affirma-

are likely to aggravate the effects of an industrial injury by concealing its connection with the job. *See id.*

170. *See* Letter from Patricia Gates, attorney for Amicus Curiae California Department of Industrial Relations, to Rose Bird, Chief Justice, California Supreme Court (July 29, 1980) (on file with the *Hastings Law Journal*). This letter complained that the *Johns-Manville* decision "not only acknowledges that employers conceal health hazards from their employees, but also seems to expect employees to 'anticipate' such deception." The *Johns-Manville* opinion was subsequently modified to meet some of the objections expressed in the letter. *Compare* slip op. at 17 *with* 27 Cal. 3d at 477, 612 P.2d at 955-56, 165 Cal. Rptr. at 865 (original opinion indicated that plaintiff "could have anticipated he might be injured because defendant concealed the dangers of the work place").

171. See notes 108-10 & accompanying text *supra*. One commentator, while discussing the duty of a seller of real property, notes that active concealment, that is, conduct seeking to conceal defects or prevent investigation and discovery of material facts, is more "obnoxious" than mere failure to disclose. 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW 2727 (8th ed. 1973).

172. See note 108 *supra*.

173. *Cf.* Note, *Workmen's Compensation: Employer Misconduct and the Exclusive Remedy*, 32 OKLA. L. REV. 704, 711 (1979) (continuation of exclusivity means "the public's interest in employee health and safety will take second place to the employer's desire for profit").

174. See notes 134-36 & accompanying text *supra*.

tive answer to this question would satisfy public policy goals and eliminate the present incongruity that allows a worker to sue a co-employee or a customer, but not an employer who batters the worker.

In the area of intentional infliction of emotional distress, the California Supreme Court seems to have left intact lower court decisions allowing suit when no physical injury is present, but disallowing suit when compensible physical injury is shown. Although suit should be allowed in both instances, the court's current policy avoids the injustice of leaving victims of this tort completely remediless.

Finally, in the area of exposure to and concealment of insidious industrial hazards, the court has approved, in a very limited sphere, a "three-tiered approach," which will allow in some cases a common-law suit for an employer's concealment of an employee's disease and its connection with the employment. Although this approach is basically sound, the distinction between causation and aggravation of the disease is artificial. The court could still distinguish between "serious and willful misconduct" and intentionally tortious conduct, denying a tort remedy for the former and allowing it for the latter, by allowing an employee to recover damages for his or her initial injuries when the employer fraudulently and actively conceals or lies about the existence of an employment hazard.

*Karl Olson**

* Member, Third Year Class.